Informed consent - where do we stand in South Africa in 2004?

The issue of informed consent seems to have re-surfaced recently. Perhaps this is as a result of the whole issue being revisited and redefined in the National Health Bill, or perhaps our patients are becoming increasingly aware of their rights, which is not a bad thing.

Chapter 2 of the National Health Bill legislates the following:

1. Every health care provider must inform a user of the following:
   - The user's health status, unless there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user.
   - The range of diagnostic procedures and treatment options generally available to the user.
   - The benefits, risks, costs and consequences generally associated with each option; anaesthesiologists are not always thorough with this option. It is often difficult to discuss costs with the patient when one sees them for the first time at the red line or in the theatre waiting area. The onus is on us as a specialty to try to correct this, as it is at the core of many complaints lodged against us.
   - The user's right to refuse health services and explain the implications, risks and obligations of such refusal.

   This information must be communicated by the health care provider in a language that the user understands and in a manner which takes into account the user's level of literacy.
2. A health service may not be provided to a user without the user's informed consent.
3. A health care provider must take all reasonable steps to obtain the user's informed consent. Informed consent means consent for the provision of a specified health service given by a person with legal capacity to do so, and who has been informed. (see above)
4. Legal capacity for the purposes of informed consent means a person over the age of 18 years who is of sound mind.
5. Exceptions to this include the following:
   - The user is unable to give informed consent and such consent is given by a person mandated by the user in writing to grant consent on his/her behalf, or the person is authorised to give consent in terms of a law or court order.
   - The user is unable to give informed consent and no person is mandated or authorised, then consent may be given by the following, in the specific order listed: the spouse/partner; a parent; a grandparent; an adult child; a brother or sister.
   - The provision of a health service without informed consent has been authorised in terms of any law or a court order.
   - Where failure to treat the user or a group of people, which includes the user, will result in a serious risk to public health.
   - Where any delay in the provision of the health service to the user might result in his/her death or irreversible damage to his or her health and the user has not expressly, impliedly or by conduct refused that service.

Thus, as can be seen, the only person that can give consent is the health user, the courts, or members of the health user's family. Neither the surgeon nor the superintendent can give consent, as is often practised in our provincial hospitals.
In addition, the Bill states:
"Where a health user is admitted to a health establishment without his/her consent, the health establishment must notify the head of the provincial department in the province in which that health establishment is situated within 48 hours after the user was admitted, unless the user gives consent within 24 hours of admission."

If one looks at the Child Care Act (Act 74 of 1983) it specifies the following with regard to the capacity of minors with regard to consent to medical treatment:

- Any minor over the age of 18 years may consent, unassisted by their parent or guardian, to the performance of an operation on themselves (i.e. surgery and anaesthesia)
- Any minor over the age of 14 years may consent, unassisted by their parent or guardian, to any medical treatment on themselves or their children
- If a practitioner is of the opinion that it is necessary to perform an operation electively on a child or to submit a child to any treatment that requires the consent of a parent or guardian and the parent or guardian refuses or cannot be found or is mentally ill or is deceased, then the practitioner must report this to the Minister of Health. The Minister may then give consent. The parent/guardian is liable for any costs incurred.
- If the treatment or operation is an emergency, then the superintendent of the hospital may give consent, provided that the operation or treatment is necessary to save the child's life or to prevent serious or lasting injury. It needs to be so urgent that there is no time to obtain the consent of the parents/guardian or Minister of Health. In this case, the parent/guardian is also liable for any costs incurred.
- If the child is institutionalised, and the treatment/operation constitutes an emergency, (to save life or permanent injury) then the head of the institution may sign consent.

The Choice on Termination of Pregnancy Act (Act 92 of 1996) legislates the following:

- A pregnant minor of any age may consent to the termina-

tion of her pregnancy without assistance from her parent or guardian, although the practitioner is advised to counsel the minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated.

Should the minor then need an operation (anaesthesia and surgery) resulting from the termination, the requirements for consent are not specified. Legal opinion is uncertain as to whether one then reverts to the requirements in the Child Care Act.

The Mental Health Act (Act 17 of 2002) dictates the following:

Certain persons may consent on behalf of mental patients where the patient's mental state of mind precludes him/her from giving informed consent. This applies to patients in mental institutions. (If the patient has not been committed to an institution, then the standard provisions in the National Health Bill apply). The authorized persons are in the following order as follows: the mentally ill person's court curator, spouse, parent, major child, brother or sister. If the medical treatment or operation is urgent and none of these people can be found, the superintendent of the mental institution may give consent.

There are a lot of other consent-related issues contained in the National Health Bill such as that relating to the removal of tissue and blood or blood products from a living person. Those have not been included here.

What about the consent form itself? Does it matter how it is worded, and is a signed consent form the be all and end all? This issue was recently reviewed by a colleague and legal advice was sought. Interestingly, the lawyer made the following points:

- Consent may be express (verbal, oral or written) or tacit (given by conduct). By signing a consent form, it is easier to make the inference that there was consent.
- The consent form should not be viewed as a waiver or indemnity, since if a patient does not receive sufficient information on which to base his or her decision, the consent may be invalid, even though the form has been signed. A patient is also entitled to withdraw consent at any time.
- In the final analysis, securing signature of the consent form does not obviate the practitioner's duty to ensure that a particular patient is given sufficient information in such a way that the decision to submit to the treatment is a rational and informed one.

Finally, it is worth taking note of the following two sections from Chapter 2 of the National Health Bill, on the importance of and the necessity for record keeping. It states the following:

- A health care provider must provide a user with a discharge report at the time of the discharge of the user from a health establishment containing such information as may be prescribed. This report may be verbal in the case of an outpatient, but must be in writing in the case of an inpatient.
- Subject to the National Archives of South Africa Act and the Promotion of Access to Information Act, the person in charge of a health establishment must ensure that a health record is created and maintained at that health establishment for every user of health services.

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